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No. 01-1372

In the Supreme Court of the United States

MINNESOTA SENIOR FEDERATION, METROPOLITAN REGION; and MARY SARNO,

Petitioners,

v.

UNITED STATES OF AMERICA; and TOMMY G. THOMPSON, Secretary of Health and Human Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

DANIEL E. GUSTAFSON
Counsel of Record
ERIC L. OLSON
KARLA M. GLUEK
HEINS MILLS & OLSON, P.L.C.
700 Northstar East
608 Second Avenue South
Minneapolis, Minnesota 55402
(612) 338-4605

Attorneys for Petitioners

2002 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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In their Brief in Opposition, Respondents fault Petitioners for "not suggest(ing) that the Medicare+Choice reimbursement formula implicates the concerns identified" in Saenz v. Roe, 526 U.S. 489 (1999). Resp. Opp. Br. 9-10. The Saenz decision, however, is not an explication of all aspects of the constitutional right to travel. (Pet. 12-13) The components described in Saenz do not cover, for example, cases holding that the right to travel protects against restrictions on international travel. See, e.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964). Saenz focussed on *state* restrictions and did not concern – as does this case – a federal statutory regime and program applicable *nationwide*, which may call for somewhat different analysis, comparisons, or standards. (Pet. 19-20) Respondents also attempt to distinguish Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), on its facts (Resp. Opp. Br. 10). However, Petitioners cited Soto-Lopez, not for any factual congruity with the present case, but for its summary of the right to travel and its statement of the fundamental principle that a law "implicates the right to travel when it actually deters such travel." Id. at 903 (Pet. 11). Soto-Lopez has been frequently cited for that proposition. See, e.g., Kansas v. United States, 16 F.3d 436, 441-42 (D.C. Cir. 1994) (recognizing the Soto-Lopez principle and finding the deterrent effect of the Wright Amendment, the particular federal statute involved, on interstate travel – air travel to and from the Dallas-Ft. Worth area – to be negligible).

Petitioners request that the Court clarify the source and nature of the right to travel and its application to federal laws (i.e., the analysis to be employed, and whether it is identical to or different from the analysis employed in cases involving state laws). A different analysis, comparisons, or standards may be called for with respect to federal laws and programs imposed nationwide (where the federal government is able to apply requirements and benefits uniformly) and with respect

to state laws and programs that are applicable statewide and are imposed by entities that do not have authority to legislate or regulate in other states. Respondents – attacking a straw man – contend that it would be wholly implausible for Petitioners to suggest (they do not) that a state is constitutionally required to provide to its residents all categories and amounts of benefits that any other state chooses to provide. (Resp. Opp. Br. 11) This is no argument against a timely clarification of right-to-travel analysis to be applied in cases involving statutes and programs applicable *nationwide*.

Respondents argue that, in Bethesda Lutheran Homes and Servs., Inc. v. Leean, 122 F.3d 443 (7th Cir. 1997), the Seventh Circuit invalidated a state law and related federal Medicaid provisions because they "prevented" the plaintiffs from becoming Wisconsin residents and receiving Medicaid benefits, while Petitioners in the present case do not allege that the federal Medicare provisions "prevent" plaintiff Sarno from becoming a Minnesota resident, only that Medicare benefit differences make Minnesota residency "less attractive." (Resp. Opp. Br. 11) Respondents are wrong on both points. In Bethesda Lutheran, the Seventh Circuit said that the "Medicaid regulations *make it difficult* for indigent incompetent nonresidents to obtain institutional care in Wisconsin" (122 F.3d at 448, emphasis added) and that the regulations "do not forbid anyone to change his state of residence," but rather, impose a "monetary penalty" on indigents who move from one state to another. Ibid. The Seventh Circuit found this to be an infringement of the right to travel, which – under Shapiro v. Thompson, 394 U.S. 618 (1969), and other decisions – must be justified. Ibid. In the present case, Petitioners specifically allege that the Medicare formula at issue "penalizes some seniors for exercising their right to travel" and that plaintiff Sarno "is deterred from and would be penalized for moving from Florida to Minnesota."

(C-17) Respondents' attempt to explain away the conflict of the Eighth Circuit's decision in this case with the Seventh Circuit's decision in Bethesda Lutheran on the basis that the latter involved regulations that "prevented" an interstate move, while this case involved regulations that merely make an interstate move "less attractive" is ill-founded and without merit. Whatever descriptive words are used, both cases involve burdens upon or impediments to interstate travel and relocation, and the two Courts of Appeals employed different, conflicting analyses.

Respondents raise the specter that Petitioners' theory "would call into question a wide range of federal programs. . . which provide different benefit levels based on regional price conditions." (Resp. Opp. Br. 9) But no other program is at issue or before the Court. Whether some other federal program might be drawn into question by a similar analysis would depend on its specific provisions and the relevant facts. If, for example, a particular program provided different amounts of benefits to participants in different geographic locations that left the participants in the same *net position* (e.g., because one receiving more benefits had greater costs), neither would have an inducement to change or to refrain from changing locations, and the right to travel would not be implicated. That is not the situation of Medicare HMO participants under the Medicare+Choice formula here at issue. A Florida participant receives substantially greater *net benefits* than a Minnesota participant, impairing and interfering with participant relocation from the former state to the latter. Allusions to possible cases not before the Court should not divert the Court from the issue presented.

CONCLUSION

On the basis of the matters set forth in the Petition and in the foregoing Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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HEINS MILLS & OLSON, P.L.C.

Daniel E. Gustafson
Counsel of Record
Eric L. Olson
Karla M. Gluek
700 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 338-4605

Attorneys for Petitioners